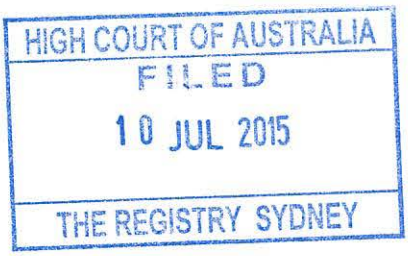
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S 99 of 2015

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES, COURT OF APPEAL



MOUNT BRUCE MINING PTY LIMITED

Appellant

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And

WRIGHT PROSPECTING PTY LIMITED

First Respondent

HANCOCK PROSPECTING PTY LIMITED Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

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Part I: Certification

1. The second respondent (**HPPL**) certifies that these submissions are suitable for publication on the internet.

Part II: Issues

2. This appeal concerns the proper construction of an agreement entered into on 5 May 1970 (**1970 Agreement**), the parties to which are Mount Bruce Mining Pty Limited (**MBM**) and Hamersley Iron Pty Limited (**HI**) on the one part and the partners in the partnership known as "*Hancock & Wright*" or "*Hanwright Iron Mines*" (**Hanwright**), HPPL and Wright Prospecting Pty Limited (**WPPL**), on the other. The issue of construction raised in this

30 appeal is the proper construction of the term "*MBM area*" as defined in the 1970 Agreement,

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particularly whether it is defined as an area of land fixed by the then existing boundaries of identified temporary reserves.

Part III: s.78B *Judiciary Act 1903* (Cth)

3. No notice is required under s.78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

Introduction

4. Subject to the following, HPPL agrees with MBM's summary of the facts.

5. Paragraph 11 of MBM's submissions (**MS**) contains a statement of the effect of the **1962 Agreement** (as defined in MS[11]) which is in part incorrect. The parties to the 1962 Agreement described the transaction recorded in the 1962 Agreement as the sale and purchase of "*all the right title and interest* [of Hanwright]… *in the said Temporary Reserves and the land comprised therein*": 1962 Agreement, recital (g), cl 1. For the reasons identified in HPPL's submissions in S102 of 2015 (at [9]), to describe the contract as a sale and purchase reflects the commercial object of the 1962 Agreement. To that extent MS[11] is correct. But MS[11] otherwise inaccurately describes the juridical effect of the contract as rights of occupancy to temporary reserves were not, in point of law, transferrable.

6. There are further facts which are relevant to this appeal. Most of those facts are recited in paragraphs 7 to 31 in HPPL's submissions in S102 of 2015. The circumstances of entry into the 1970 Agreement and the background facts then known to the parties are identified in those paragraphs. Other facts relevant to the appeal are as follows.

Mutually known background prior to 5 May 1970

7. Clause 2.2 of the 1970 Agreement contains a reference to MBM acquiring rights, which is referred to in MS[18]. The concept of acquisition of rights as used in cl 2.2 of the 1970 Agreement is given content by the factual and statutory background to the 1970 Agreement. *First*, the rights held by Hanwright under the *Mining Act 1904* (WA) (**Mining Act 1904**) were rights of occupancy over or in relation to the areas subject of the identified temporary reserves, not the identified temporary reserves: s.276 of the *Mining Act 1904*; contrast MS[28]. The effect of s.276 of the *Mining Act 1904* was that the temporary reserves were areas of land reserved from occupation. A temporary reserve conferred no rights. *Second*, as had occurred prior to 5 May 1970 (a then recent example was the Paraburdoo temporary reserve), in giving effect to prior contracts between Hanwright and companies owned by Hamersley Holdings Limited (**Hamersley Group**) the acquirer did not acquire the rights of occupancy held by

Hanwright in the sense of taking an assignment of those rights. The rights of occupancy over those temporary reserves were cancelled, in effect at Hanwright's request, and new rights of occupancy were issued[1]. *Third*, Hanwright's rights under the 1967 Hanwright State Agreement[2] (as varied in 1968) were not capable of being assigned consistently with the 1970 Agreement (because those rights were not divisible) without further amendment and the consent of the State. MBM did not give notice under the 1968 Hanwright State Agreement, as it was entitled to do, and replace Hanwright as a party to the 1967 Hanwright State Agreement. Instead the 1970 Agreement expressly contemplated rights and obligations created by the 1967 Hanwright State Agreement (as amended) be varied and new or different rights created: cl 2.3, cl 4; contrast MS[32]-[34]. Those varied rights were not derivative from the 1967 Hanwright State Agreement, but were the subject of later negotiation with the State.

8. There is a further consequence of the character of the rights held by Hanwright. There was no or no necessary continuity of the grant of mineral exploration or mining rights. The *Mining Act 1904* created a system of separate grants of different types of mineral tenements. In point of fact the absence of any necessary continuity of title was apparent from the parties' dealings shortly prior to 5 May 1970: items 3 to 7 of WPPL's chronology. For example, whether or not a later retrospective grant was effective, in point of fact on 5 May 1970 neither HI nor Hanwright held a right of occupancy or other tenement over the Paraburdoo area.

9. In its submissions MBM advances a contention that the parties objectively knew that the maximum area of any mineral lease which would be granted by the State to MBM and Hanwright following entry into the 1970 Agreement and renegotiation of the 1967 Hanwright State Agreement was 300 square miles. That is compared to the approximately 400 square mile area of the rights of occupancy acquired by MBM under the 1970 Agreement: MS[49]-[51]. There is no finding of fact to that effect, and MBM's proposition is inconsistent with (a) the evidence at trial and (b) cl 2.3 of the 1970 Agreement. The area of a mineral lease which was to be granted to MBM was neither unchangeable nor thought to be unchangeable. The terms of the 1970 Agreement demonstrate that the parties objectively contemplated that the 1967 Hanwright State Agreement (as varied) would be renegotiated with the State after 5 May 1970: cl 4 and cl 10, CA[13]. The area of the mineral leases to be granted to MBM and Hanwright was, and was seen to be, capable of renegotiation: cl 2.3 of the 1970 Agreement.

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[1] That is consistent with the proper construction of s.276 of the *Mining Act 1904* which did not permit assignment of rights of occupancy: *Delhi International Oil Corp v Olive* [1973] WAR 52 at 54

[2] MBM's abbreviations, **1967 Hanwright State Agreement** and **1968 Hanwright State Agreement**, are adopted.

The potential for amendment to state agreements was also known to the parties. The 1967 Hanwright Agreement had been amended by the 1968 Hanwright State Agreement following MBM, HI and Hanwright entering into the 1968 Agreement: TJ[18]. The effect of the 1968 Hanwright State Agreement was to confer on MBM an option to replace Hanwright as a party to the 1968 Hanwright State Agreement, in effect conferring on a company in the Hamersley Group the option to take up a further mineral lease of up to 300 square miles in addition to HI's mineral lease. At the same time the agreement between HI and the State ratified by the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) was amended to increase the area of the mineral lease to which HI was entitled by 50 square miles: *Iron Ore (Hamersley Range) State Agreement Act 1968* (WA) Sch 1 cl 6(2)(a).

Events after 5 May 1970

10. The question of construction raised by this appeal arises in the circumstances identified in Part II Section A of the Agreed Facts and Diagrams document, and the agreed chronology.

11. The mine referred to as **Eastern Ranges** is within the area which was, on 5 May 1970, subject of temporary reserve 4967H. The mine referred to as **Channar** is within the area which was, on 5 May 1970, subject of temporary reserves 4965H to 4967H.

12. On 10 March 1972 MBM and State entered into an agreement, which was ratified on 16 June 1972 by the *Iron Ore (Mount Bruce) Agreement Act 1972* (WA) (**MBM State Agreement**). By cl 4(1) of the MBM State Agreement the State agreed to grant to MBM rights of occupancy over, *inter alia*, temporary reserves 4965H to 4967H. Those rights of occupancy expired on the grant of a mineral lease under cl 4(2) of the MBM State Agreement. By clause 4(2) of the MBM State Agreement the State agreed to grant a mineral lease, covering up to 300 square miles, over areas subject of the agreement[3].

13. Pursuant to cl 4.2 of the MBM State Agreement, on 31 May 1974 MBM applied for the grant of a mineral lease over an area of 210.91 square miles, including over the areas referred to by the Court of Appeal as **Channar B**. MBM did not apply for the grant of a mineral lease over Eastern Ranges or the balance of Channar, referred to by the Court of Appeal as **Channar A**: TJ[29], [39].

[3] At the same time Hanwright and the State entered into the *Iron Ore (Wittenoom) Agreement Act 1972* (WA) pursuant to which Hanwright was granted the right to a mineral lease over an area of up to 100 square miles. As contemplated by cl 2.3 of the 1970 Agreement, Hanwright and MBM did successfully negotiate a right to mineral leases with, in combination, a total area of in excess of 300 square miles: Hanwright obtained a right to a 100 square mile lease, MBM obtained a right to a 300 square mile lease.

14. On MBM's application for a mineral lease and pursuant to cl 4(2) of the MBM State Agreement, on 17 October 1974 the State granted mineral lease ML 252 to MBM, over areas including Channar B. The consequence of MBM's choice as to the areas over which it applied for a mineral lease is that the rights of occupancy over the balance of temporary reserves 4965H to 4967H, including Eastern Ranges and Channar A, expired: TJ[29]-[30], [39]-[41].

15. In response to an application by MBM, on 26 August 1977 the State granted MBM a new right of occupancy over a new temporary reserve which included the area now known as Eastern Ranges: temporary reserve 6603H, TJ[31]. The subsequent surrender of that right of occupancy and grant of a mineral lease over the area known as Eastern Ranges are shown in Part II Section A of the Agreed Facts and Diagrams document, but are of no significance to the construction issue raised by MBM's appeal. That is because MBM relies on the expiry of the rights of occupancy on 17 October 1974, without an immediate fresh grant over the same area, as sufficient to defeat Hanwright's right to a royalty on ore won from Eastern Ranges.

16. Similarly, following applications by Hamersley Exploration Pty Limited (**HamEx**), which is also part of the Hamersley Group, on 21 April 1978 and 2 May 1979 HamEx was granted rights of occupancy over areas which included Channar A: TJ[44]-[45]. As with Eastern Ranges, the subsequent series of surrenders and grants is of no significance to MBM's appeal. It is the expiry of the rights of occupancy on 17 October 1974, without immediate grant of another tenement, on which MBM relies.

Part V: Constitutional and Statutory Provisions

17. In addition to the statutes identified by MBM, Hanwright also relies on the parts of the first schedule to the *Iron Ore (Hamersley Range) State Agreement Act 1968* (WA) and the *Iron Ore (Mount Bruce Agreement) Act 1972* (WA) referred to in the schedule to these submissions.

Part VI: Second Respondent's Argument

Introduction

18. The obligation and correlative right created by cl 3.1 of the 1970 Agreement is subject to two conditions. MBM's appeal is concerned with the second condition in clause 3.1. The royalty is payable on "*ore won... from the MBM area*". The Court of Appeal was correct to hold that "*MBM area*" means the area delineated by the temporary reserves referred to in cl 2.2 on 5

May 1970 or, in effect, on completion[4]: CA[45] (Macfarlan JA), [87] (Meagher JA), Barrett JA agreeing in both judgments.

19. The proper construction of the term "*MBM area*" in the 1970 Agreement is determined by reference to the language used by the parties, the surrounding circumstances known to the parties at the time the contract was entered into and the commercial purpose or objects to be secured by the contract: *Electricity Generation Corporation v Woodside Energy Limited* [2014] HCA 7 (2014) 251 CLR 640 at [35]. The surrounding circumstances include the statutory background: *Maggbury Pty Limited v Hafele Australia Pty Limited* [2001] HCA 70 (2001) 210 CLR 181 at [11]; *Amcor Limited v Construction, Forestry, Mining and Energy Union* [2005] HCA 10 (2005) 222 CLR 241 at [50].

Construction

20. Language: the starting point is the language used by the parties. For the following reasons the language of the 1970 Agreement provides a strong basis for the Court of Appeal's construction, and is inconsistent with the construction advanced by MBM.

21. *First*, cl 2.2 contains the definition of "*MBM area*". The defined term, in parentheses, attaches to the preceding phrase "*temporary reserves 4937H to 4946H inclusive and 4963H to 4967H inclusive*". The enumerated temporary reserves were areas of land reserved under s.276 of the *Mining Act 1904*: also CA[88]. Those words as used in cl 2.2 are descriptive of defined and certain areas of land: the land that was subject to the enumerated temporary reserves on 5 May 1970, subject only to the possible alteration of the area prior to the division required by cl 2.2 being completed.

22. The language used in cl 2.2 demonstrates that the object of cl 2.2 was the division of Hanwright's rights to the "*Mount Bruce Temporary Reserves*". In cl 2.2 the "*Mount Bruce Temporary Reserves*" are separated into two groups, which are the subject of the two parts of cl 2.2. The subject of that part of cl 2.2 after the word "*and*" in the fourth last line of the clause is identified by the reference to the temporary reserves enumerated in the second and third last lines. The structure of that part of cl 2.2 is to identify the enumerated temporary reserves, to define "*MBM area*" by reference to those enumerated temporary reserves, and to then give effect to the object of the clause by providing that MBM acquired the rights over or attached

[4] Clause 1.4 of the 1970 Agreement, at least in part, is directed to the possibility that the boundaries of the temporary reserves be adjusted between 5 May 1970 and completion, but that did not occur and does not affect the construction issue. Meagher JA explained the possibility in CA[98].

to the areas within the boundaries of the enumerated temporary reserves: CA[41], [95], [100]; TJ[100]-[101].

23. The construction advanced by MBM departs from the language used. In effect, the construction advanced in MS[23] involves a disconnect between the division of rights (by reference to the enumerated temporary reserves) and the imposition or assumption of obligations. That disconnect accords neither with the language used nor the commercial sense of the 1970 Agreement. By the 1970 Agreement the parties identified the rights to be divided by reference to the areas of land to which those rights then attached, and defined their respective obligations by reference to areas of land identified in and fixed by the 1970 Agreement: CA[46], [91]. There is objectively apparent commercial sense in that construction, and is consistent with achieving certainty (in contrast to the uncertain concept of derived rights in the context of the *Mining Act 1904*).

24. The balance of the language of cl 2.2 is consistent with the Court of Appeal's construction. The final words of cl 2.2 are "*MBM acquires the entire rights thereto* [ie to the "*MBM area*"]". In the context of tenements or choses created by the *Mining Act 1904*, to state that rights to or over an area of land be acquired makes both conceptual and grammatical sense. Contrary to the construction advanced by MBM (MS[43]-[45]), it makes little sense to refer to MBM acquiring rights to rights: CA [46]. Further, in cl 2.2 the parties chose to use a defined term "*MBM area*". The use that can be made of the term defined is addressed later in these submissions. Subject to that issue, in cl 2.2 the use of the word "*area*" in the term defined is consistent with the subject of the definition being an area of land as defined by the boundaries of the enumerated temporary reserves.

25. *Second*, in cl 2.2 the parties used the term "*Mount Bruce Temporary Reserves*", a term defined in cl 1.1. The Court of Appeal correctly held that cl 1.1 provides further support for the construction which it held to be correct. Clause 1.1 demonstrates that the parties defined their rights and obligations by reference to areas of land identifiable on 5 May 1970. The "*Temporary Reserves*" referred to in cl 1.1 are described as being in relation to areas, and are further identified on a map. The enumerated "*blocks*", a term consistent only with an identified physical area, are then defined as the "*Mount Bruce Temporary Reserves*": CA[42], [96]. MBM's construction (MS[40]-[41]) is inconsistent with the repetition of the word "*blocks*" in cl 1.1 and with the definition of "*Mount Bruce Temporary Reserves*" attaching to the words "*these blocks*", which are described as an area shown on a map.

26. *Third*, cl 1.4 expands the meaning of "*blocks or reserves*" by using the word "*includes*". MBM's submissions have the effect that cl 1.4 becomes an exhaustive definition of "*blocks or reserves*" (MS[59]), which it is not. The expansion of "*blocks or reserves*" to include extensions of orebodies "*located therein*" and to adjustments to the present boundaries is consistent with the primary meaning of "*blocks or reserves*", namely areas of land: CA[43]-[44], [97]-[99].

27. MBM's construction is not supported by the expansionary reference to rights in cl 1.4. The rights referred to in cl 1.4 are only "*rights of Hanwright*". The expanded definition, at least insofar as referring to future rights, is directed to the period between 5 May 1970 and completion. Once cl 2.2 was given effect to Hanwright had no rights to the "*MBM area*", whether derived from the *Mining Act 1904* or the 1968 Hanwright State Agreement.

28. *Fourth*, the construction advanced by MBM (MS[23], [71]-[72]) involves reading words into the 1970 Agreement. Neither the words used in MS[23] nor the concept of rights "*deriving*" from other rights appear in the 1970 Agreement. That is no small matter. The concept of rights deriving from other rights is both complex and uncertain. It is unlikely that the parties intended their commercial relationship to be regulated on the basis of unexpressed complexity.

29. *Fifth*, the use of the defined term "*MBM area*" in the 1970 Agreement provides further support for the Court of Appeal's construction. Clauses 3.1 and 3.2 use the phrase "*Ore won… from the MBM area*". Ore is won from an area of land. It is to stretch the language used beyond its apparent meaning to construe those clauses as referring to ore being won "*from*" a bundle of rights. On MBM's construction the clauses ought to read "*Ore won… through the exercise of* [the relevant derivative rights]". A reasonable business person in the position of the parties would not read those words into the otherwise clear language "*Ore won… from the MBM area*". The language of "*ore from*" is repeated in the chapeau to cl 6 and cl 6.12 in relation to the "*Hanwright area*" (which is similarly defined). Clause 6.12 also refers to "*ore produced by Hamersley from its areas*", language consistent with the Court of Appeal's construction. Clause 9 repeats that language. Clause 12 is also consistent with the Court of Appeal's construction, referring to "*mining of the MBM area*": CA[50], [101].

30. *Finally*, the occasions on which the term "*MBM area*" is used in the 1970 Agreement also show that the Court of Appeal's construction is correct. The Court of Appeal's construction follows if it be assumed that, contrary to paragraph 21 of these submissions, MS[43] and [44] are correct and the phrase "*temporary reserves 4937H to 4946H inclusive and 4963H to 4967H*

inclusive" in cl 2.2 is directed to both the areas of land subject to those temporary reserves and the associated rights held by Hanwright. Making that assumption does not alter the proper construction of "*MBM area*". The land comprised in the "*MBM area*" is fixed by reference to the area which, on 5 May 1970[5], was delineated by the boundaries of those temporary reserves and which was subject to the connected rights held by Hanwright. Whether defined by the boundaries of the enumerated temporary reserves or the rights attaching to those temporary reserves, the "MBM area" was the same on 5 May 1970 and completion.

31. The meaning of the term "*MBM area*" was not intended to be ambulatory after completion. The parties' objective intention to define their respective rights and obligations by reference to an area fixed and ascertainable on 5 May 1970 (or completion of the acquisition under cl 2.2) is demonstrated as each use of the defined term "*MBM area*"[6] in the 1970 Agreement is in relation to events which could only occur at a point in time once mining had commenced. Before mining of any part of the "*MBM area*" could occur the temporary reserves had to cease to exist because the reserves were incompatible with mining: s.276. To the same effect, from completion (and before mining) Hanwright was to hold no rights to the "*MBM area*" and the extension in cl 1.4 referring to Hanwright's rights had no ongoing operation. If as MBM contends the meaning of "*MBM area*" was intended to vary over time, it makes no sense to defined the term by reference to temporary reserves and rights which would not exist at the only times at which the definition was engaged. The language used identifies the "*MBM area*" at the date of the contract, or completion.

32. Surrounding Circumstances: the construction advanced by Hanwright and held correct in the Court of Appeal is also apparent from the surrounding circumstances known to the parties at 5 May 1970.

33. *First*, in the contracts partly incorporated into and varied by the 1970 Agreement (the 1962 Agreement and the 1968 Agreement respectively) Hanwright and companies in the Hamersley Group dealt on the basis that their respective rights and liabilities (including in relation to the royalty created by each contract) were defined by reference to areas of land.

34. The 1962 Agreement, in part, is incorporated into the 1970 Agreement: 1970 Agreement cl 3.1. In the 1962 Agreement the parties treated their rights and obligations as being in relation to areas of land: recital (g) defining "*the Temporary Reserve land*" to include the land subject to the temporary reserves identified in that agreement, cl 1. The royalty provided for in cl 9 (the

[5] Or at the date of completion, which alternative is correct has no consequence.

conditions of which are incorporated into the 1970 Agreement) is payable on ore won from, *inter alia*, the "*the Temporary Reserve land*" which, by recital (g), is the area of land subject of the temporary reserves referred to in schedule 2: recital (f).

35. The royalty payable under the 1962 Agreement is also payable on ore won from the area marked blue on the attached map: cl 10, schedule 3. The obligation imposed on HI to pay a royalty was created by reference to areas of land not rights. That expanded right to a royalty is significant. As was agreed at trial (transcript page 352 lines 3 to 23; MBM's written submission which became MFI-2), in 1962 Hanwright held no rights over the area coloured blue on the map attached to the 1962 Agreement. The royalty payable under cl 9 of the 1962 Agreement was payable on ore won from the area coloured blue although Hanwright never held rights over that area.

36. Contrary to MS[38], [76]-[82], the 1962 Agreement is not consistent with MBM's construction. In the 1962 Agreement the royalty – the conditions of which are incorporated into the 1970 Agreement - was payable by reference to the identified areas irrespective of any rights attaching to the areas. Absent clear language in the 1970 Agreement, it is wrong to attribute to the parties an objective intention to change the basis on which they dealt. That MBM's construction is erroneous is reinforced as, in point of fact, Hamersley's Mount Tom Price mine is in the area marked blue on the 1962 Agreement map and, by 5 May 1970, Hamersley was paying a royalty on ore won from Mount Tom Price: transcript page 352 lines 3 to 23; MFI-2. That surrounding circumstance tells against the parties intending that Hanwright's right to a royalty be limited to those areas over which it had held rights of occupancy and which continued to be subject of rights derived from those rights of occupancy.

37. That Hanwright and MBM intended the obligation to pay a royalty to be referrable to ore won from the area of land defined by the boundaries of the enumerated temporary reserves is further demonstrated by cl 19 and cl 24(iii) of the 1962 Agreement. Those clauses are conditions on the royalty, and consequently incorporated into the 1970 Agreement. Each refers to successors or assigns of, or persons deriving title through or under, HI to areas of land. Those clauses do not refer only to successors or assigns of, or persons deriving title through or under to, rights or derivative rights: CA[102]. The incorporation of those terms without amendment shows an objective intention that the basis of the obligation, ore won from the described areas, be consistent in the 1962 Agreement and the 1970 Agreement.

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[6] Other than where it is defined in cl 2.2.

38. *Second*, the 1968 Agreement is referred to in cl 1.2 of the 1970 Agreement. By the 1970 Agreement HI relinquished the rights created by the 1968 Agreement: cl 2.1. The 1968 Agreement created rights and obligations (including a royalty) by reference to "*blocks and properties*" which were identified temporary reserves: opening paragraph of the "*Preamble*", definition of "*Mount Bruce Reserves*" at the end of the "*Preamble*", Part I cl 3, Part II cl A.5. Those of the rights and obligations created by the 1968 Agreement which remained executory on 5 May 1970 (Part I was wholly executed by 5 May 1970) were in effect rescinded or relinquished by cl 2.1 of the 1970 Agreement. In that circumstance, absent clear language to the contrary, objectively the parties intended to continue dealing on the basis of areas defined by the boundaries of the enumerated temporary reserves.

39. *Third*, the rights which Hanwright held on 5 May 1970 either were not transferrable (the rights of occupancy) or, to achieve the object of the 1970 Agreement, could not or may not have been transferred to MBM (the rights created by the 1968 Hanwright State Agreement). Further, on 5 May 1970 Hanwright did not have any right to mine, a right necessary to engage cl 3.1 of the 1970 Agreement. Achieving the object of the 1970 Agreement, MBM winning ore to the benefit of MBM and Hanwright, in the context of the *Mining Act 1904* did not involve a continuous uninterrupted chain of changing rights. Necessarily at least two surrenders (or equivalent) and grants were required. As both the commonly known historical facts and the *Mining Act 1904* demonstrate, a grant did not necessarily follow immediately from a surrender (or expiry), nor is one mineral tenement necessarily derived from another tenement.

40. Commercial Object: the apparent commercial object of the 1970 Agreement is given effect to by the Court of Appeal's construction.

41. The commercial object of the 1970 Agreement was for Hanwright, in effect, to transfer to MBM all its interest in the areas or blocks defined as the "*MBM area*" so as to allow MBM to explore and subsequently mine those areas. The consideration which MBM agreed to pay was substantially the royalty on ore won (a) by "*MBM*" (b) from the "*MBM area*". That aligned Hanwright's and MBM's interests: greater the quantity of ore won from the "*MBM area*" by "*MBM*" greater the income to MBM and greater the royalty payable to Hanwright. In that context it is improbable that the parties intended that MBM could by choice vary the "*MBM area*".

42. Once MBM had the right to explore and subsequently exploit the areas of land referred to, it was in MBM's control to determine (subject to regulation or limitation by the State, the extent of which was uncertain) where it would explore for ore and from where it would attempt to win ore. The commercial sense of the *quid pro quo* of sale, in the sense described, of Hanwright's interest in and rights to the "*MBM area*" was that, if the two conditions in cl 3.1 were met, the royalty was payable. As the Court of Appeal correctly held (CA[52]-[53], also TJ[106]-[107]) having transferred its interest or rights in relation to the area subject of the enumerated temporary reserves it made commercial sense for Hanwright to obtain a royalty on ore won from any part of that area by "*MBM*" (contrary to MS[48]).

10 43. Similarly it is objectively unlikely that the parties intended that Hanwright's rights to the royalty could be defeated by a gap between surrender of rights over an area and grant of a new bundle of rights; which is the consequence of MBM's construction. Periods in which there was a gap between exploration or mining rights could occur through mistake, delay by the State or deliberate decision (whether directed to Hanwright's rights or to other commercial object): CA[53]. The bargained for right to payment of a royalty was not objectively intended to be subject to contingencies of that type. Contrary to MBM's submission (MS[70]), the risk of another party obtaining a tenement is no reason to disregard that reasoning. *First*, if there was a real risk, that risk does not engage with mistake, delay by the State or a calculated assessment of risk by MBM in making commercial decisions. *Second*,

20 there is little evidence to support a proposition that the parties knew, on 5 May 1970, that there was a real risk of a company outside the Hamersley Group applying for a tenement over any part of the relevant temporary reserves. Prior to May 1970 rights of occupancy, held by the Hamersley Group and Hanwright, had expired without another person obtaining an exploration or mining tenement over those areas. That evidence does not support MBM's submissions that there was significant risk, known as at May 1970, of another person obtaining rights to explore or mine the areas.

44. The Court of Appeal was correct to hold that a period between MBM holding tenements over the land, a gap between mineral tenements, did not alter the "*MBM area*".

45. MBM's argument also involves a sophisticated construct limiting MBM's obligations (but not

30 Hanwright's obligations) to an ambulatory bundle of rights. That construction attributes to the parties the objective intention that their rights and correlative obligations be determined by reference to rights transferred (in the inaccurate sense described) and rights derived from

those rights. That involves attributing to the parties an intention to (a) deal in juridical concepts, albeit from an incorrect premise that the rights were to be transferred and could result in derivative rights and (b) import the concept of rights derived from other rights. The Court of Appeal was correct to hold that these commercial parties did not regulate their rights and obligations by reference to that imprecise and unexpressed construct.

46. Finally, MBM's argument as to the commercial operation of the 1970 Agreement is based on the erroneous premise that MBM was known to be necessarily limited to a 300 square mile mineral lease: see paragraph 9 above. That error informs MBM's subsequent submission (MS[51]) that, on the Court of Appeal's construction, Hanwright receives "*something... for nothing*". That is wrong. Hanwright is entitled to the royalty as consideration for, in effect, transferring exploration rights to MBM over the whole the area which, in May 1970, was subject of "*temporary reserves 4937H to 4946H inclusive and 4963H to 4967H inclusive*". For the reasons identified it made good commercial sense for the parties to agree that Hanwright be paid a royalty on all ore won by MBM from the area the subject of the rights of occupancy when transferred.

The term defined

47. MBM is critical of the Court of Appeal's reliance on the term defined, "*MBM area*", as an aid to construction: MS[65]-[68]. The Court of Appeal's reasons are consistent with the judgment of the House of Lords in *Chartbrook Limited v Persimmons Homes Limited* [2009] UKHL 38 [2009] 1 AC 1101 at [17] per Lord Hoffmann (also at [94] per Lord Walker of Gestingthorpe) and the Australian authorities referred to CA[39]. MBM's criticism of the Court of Appeal's reasoning is not of significance to the outcome of the appeal as the term defined is one only of the grammatical indicia of the proper construction of the 1970 Agreement. Nonetheless, it should be held that the Court of Appeal was correct to regard the term defined as informing the proper construction of the 1970 Agreement.

48. *First*, there is logical force to the proposition that parties to a contract usually choose a label which is a distillation of the meaning or purpose of the concept defined: *Chartbrook* at [17]. Irrespective of whether that reasoning is applicable to drafting of legislation, expressed (as it was by Lord Hoffmann) subject to the condition "*usually*" the reasoning in *Chartbrook* is correct in the context of a commercial contract. *Second*, MBM's argument has the unlikely consequence that, contrary to the usual rule that words in a contract are to be construed in the context of the clause and the contract as a whole, the word or term defined must be

ignored in construing the meaning of that word or term: *Segelov v Ernst & Services Pty Limited* [2015] NSWCA 156 at [86]-[87] per Gleeson JA, Meagher and Leeming JJA agreeing. A rule to that effect is wrong, and too absolute. *Third*, construing the definition by reference to the term defined may sometimes involve circular reasoning: as in *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419). Accepting that risk, often reliance on the term defined will not be circular, particularly if the term defined is relied on to resolve rather than identify ambiguity.

49. That the parties to the 1970 Agreement defined the term "*MBM area*" (and "*Hanwright area*") shows an objective intention that the parties were directing attention to areas of land defined by the existing temporary reserves and not to an ambulatory bundle of rights. The area is the areas the subject of the enumerated temporary reserves. The Court of Appeal was correct to hold that the term defined supported the *prima facie* meaning of the language used, and was inconsistent with the construction advanced by MBM: CA[47], [103].

MBM's further arguments

50. Most of MBM's submissions have already been addressed.

51. MBM's submissions are critical of the Court of Appeal for not considering that the subject of the 1970 Agreement included Hanwright's rights under the 1967 Hanwright State Agreement: MS[35]. That criticism is misplaced. The Court of Appeal referred to the rights created by 1967 Hanwright State Agreement (CA[10], [12] per Macfarlan JA; [88]-[89] per Meagher JA) and, in analysing the effect of cl 1.4 and cl 2.2 of the 1970 Agreement, reasoned by reference to Hanwright's rights without relevant limitation (CA[44]-[46] per Macfarlan JA, [91], [97]-[100] per Meagher JA). The Court of Appeal reasoned that the rights acquired by MBM were those over or in respect of the "*MBM area*". It was correct to do so.

52. MBM's submission (MS[53]-[55]) that the use of the word "*Royalty*" in cl 3.1 of the 1970 Agreement is inconsistent with the Court of Appeal's construction was correctly rejected by the Court of Appeal: CA[48]. *First*, as the Court of Appeal held, to describe the payments due to Hanwright as a royalty is apt as a matter of common use of language. *Second*, as a right to mine could only be granted by the State and not by Hanwright, the definition advanced by MBM is necessarily inapposite. On no view is MBM's definition apt as Hanwright did not grant a right to mine to MBM. *Third*, in cl 3.1 of the 1970 Agreement the parties equated the "*Royalty*" with the obligation imposed by the 1962 Agreement on HI to pay a percentage of the sale price of ore to Hanwright. As already described, that obligation related to ore won

from areas over which Hanwright never held any rights, and over which Hanwright conferred no rights on MBM. The parties did not use the word "*Royalty*" in the limited way advanced by MBM.

Conclusion

53. For the reasons identified the Court of Appeal was correct in relation to the issue the subject of MBM's appeal, the proper construction of "*MBM area*". MBM's appeal should be dismissed with costs.

54. As WPPL identifies in its submissions, if that is wrong but WPPL and HPPL succeed in S102 of 2015 (the "*through or under*" issue) the orders for which MBM contends do not follow because of the "*extensions of ore bodies*" issue: CA[34], [35] and [84]. HPPL adopts WPPL's submissions on the form of orders in that contingency.

Part VIII: Time Estimate

55. It is anticipated that counsel for WPPL will present the large part of the argument on this appeal. On that basis HPPL estimates that it will require 20 minutes for the presentation of its argument in this appeal.

Dated: 10 July 2015

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Schedule

Iron Ore (Hamersley Range) State Agreement Act 1968 (WA)

First Schedule, cl 6(2)(a)

Obligations of the State — Rights of Occupancy

6(1) The State shall forthwith (subject to the surrender of the rights of occupancy as referred to in clause 4(2) of the agreement secondly referred to in the First Schedule hereto) cause to be granted to the Company and to the Company alone rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore) over the whole of the mining areas under Section 276 of the Mining Act at a rental at the rate of eight dollars ($8) per square mile per annum payable quarterly in advance for the period expiring on 31st December, 1968, and shall then and thereafter subject to the continuance of this Agreement cause to be granted to the Company as may be necessary successive renewals of such last-mentioned rights of occupancy (each renewal for a period of twelve months at the same rental and on the same terms) the last of which renewals shall notwithstanding its currency expire —

(i) on the date of grant of a mineral lease to the Company under sub-clause (2) hereof;

(ii) on the expiration of five years from the date hereof; or

(iii) on the determination of this Agreement pursuant to its terms;

whichever shall first happen.

(2) The State shall as soon as conveniently may be after all the proposals required to be submitted by the Company pursuant to clause 4(1) hereof have been approved or determined pursuant to clause 5 hereof —

Mineral lease

(a) after application is made by the Company for a mineral lease of any part or parts (not exceeding in total area fifty (50) square miles and in the shape of a rectangular parallelogram or parallelograms or as near thereto as is practicable) of the mining areas in conformity with the Company's detailed proposals under clause 4 hereof as finally approved or determined cause any necessary survey to be made of the land so applied for (the cost of which survey to the State will be recouped or repaid to the State by the Company on demand after completion of the survey) and shall cause to be granted to the Company a mineral lease of the land so applied for (notwithstanding the survey in respect thereof has not been completed but subject to such corrections as may be necessary to accord with the survey when completed) for iron ore in the form of the Second Schedule hereto for a term which subject to the payment of rents and royalties hereinafter

mentioned and to the performance and observance by the Company of its obligations under the mineral lease and otherwise under this Agreement shall be for a period of twenty-one (21) years commencing from the date of application by the Company therefor with rights to successive renewals of twenty-one (21) years upon the same terms and conditions but subject to earlier determination upon the cessation or determination of this Agreement PROVIDED HOWEVER that the Company may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State any portion or portions (of reasonable size and shape) of the mineral lease;

...

***Iron Ore (Mount Bruce Agreement) Act 1972* (WA)**

First Schedule cl 4

Obligation of State Rights of Occupancy

4(1) The State shall forthwith (subject to the surrender of the rights of occupancy as referred to in sub-clause (2) of clause 2 of the Agreement firstly referred to in the First Schedule hereto) cause to be granted to the Company and to the Company alone rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore) over the whole of the mining areas under Section 276 of the Mining Act at a rental at a rate of eight dollars ($8) per square mile per annum payable quarterly in advance for the period expiring on the 31st day of December, 1972, and shall then and thereafter subject to the continuance of this Agreement cause to be granted to the Company as may be necessary successive renewals of such last mentioned rights of occupancy (each renewal for a period of twelve (12) months at the same rental and on the same terms) the last of which renewals shall notwithstanding its currency expire —

(i) on the date of grant of a mineral lease to the Company under subclause (2) of this clause; or

(ii) on the determination of this Agreement pursuant to its terms whichever shall first happen.

Mineral lease

(2) The Company may at any time after the grant to it of the said rights of occupancy and before the end of year 2 apply for a mineral lease of any part or parts (not exceeding in total area three hundred (300) square miles and in the shape of a rectangular parallelogram or rectangular parallelograms or as near thereto as is practicable) of the mining areas and thereupon the State shall cause any necessary survey to be made of the land so applied for (the cost of which survey to the State will be recouped or repaid to the State by the Company on demand after completion of the survey) and shall cause to be granted to the

Company a mineral lease of the land so applied for (notwithstanding the survey in respect thereof has not been completed but subject to such corrections as may be necessary to accord with the survey when completed) for iron ore in the form of the Second Schedule hereto for a term which subject to the payment of rents and royalties hereinafter mentioned and to the performance and observance by the Company of its obligations under the mineral lease and otherwise under this Agreement shall be for a period of twenty-one (21) years therefor with rights to successive renewals of twenty-one (21) years upon the same terms and conditions but subject to earlier determination upon the cessation or determination of this Agreement PROVIDED HOWEVER that the Company may from time to time (without abatement of any rent then paid or payable in advance) surrender to the State any portion or portions (of reasonable size and shape) of the mineral lease.